No. 97-1671

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WHITEHALL TENANTS CORP.; HORACE BULLARD; ITA BULLARD; FRED GRUNBERG; JOSEPH JABLON; MARY JABLON; SUSAN ISAACS; PHILIP POLLACK; WALTER SPIER; ROSEMARIE SPIER; LUDWIG BRAVMANN, individually and as representatives of the class of non-sponsor shareholders of shares in Whitehall Tenants Corp.,

Petitioners,

vs.

WHITEHALL REALTY CO., a partnership; SYLVIA OLNICK, as Executrix of the Estate of Robert S. Olnick; RICHARD LANE; PAUL MILSTEIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a case may be validly adjudicated by a panel of two circuit judges under circumstances where one of the three judges originally assigned to hear the appeal recused himself immediately after oral argument?

2. Whether a case may be validly adjudicated by a panel of two circuit judges under circumstances where one of the two judges deciding the case heard a tape-recording of the oral argument in lieu of personal attendance?

PARTIES TO THE PROCEEDING

The parties to the proceeding are contained in the caption of the case. Disclosure pursuant to Rule 29.6 is inapplicable, as none of the respondents has a parent or subsidiary company.

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STATEMENT OF THE CASE

Respondent adopts the statement of the facts and procedural history contained in the decision of the Court of Appeals for the Second Circuit below. App. 27a-28a.

REASONS FOR DENYING THE WRIT

The petition's fact-bound claim that the court below violated 28 U.S.C. § 46(d) and the Second Circuit's Local Rule § 0.14(a) does not warrant review by this Court. The decision below, which held that the Second Circuit neither violated the quorum requirement under 28 U.S.C. § 46(d), nor its own Local Rule, was plainly correct. No conflict among the circuits is alleged. The Second Circuit has not, moreover, "so far departed from the accepted and usual course of judicial proceedings" so as to warrant the exercise of this Court's supervisory power under Rule 10(a).

I.

THE PETITION SHOULD BE DENIED BECAUSE THE COURT BELOW ACTED IN COMPLIANCE WITH 28 U.S.C. § 46 AND SECOND CIRCUIT LOCAL RULE § 0.14.

1. The Second Circuit's Summary Order was issued in compliance with the quorum requirements of 28 U.S.C. § 46(d) and its Local Rule § 0.14. While courts of appeal may hear and determine cases and controversies by panels consisting of three judges, the authority of a two-judge panel to adjudicate a matter in the absence of a third judge originally designated to serve with a panel is well-established. Under 28 U.S.C. § 46(d), "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall

constitute a quorum." *See Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 138, 67 S. Ct. 1168, 1171, 91 L. Ed. 1391 (1947) (comparing two-judge quorum provision for panel of court of appeals with absence of such provision for statutory three-judge district court); *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 927 (2d Cir. 1957) (finding that where one of three judges of Court of Appeals hearing case dies after expressing his concurrence in disposition adopted by majority, remaining two judges constituted a quorum which could dispose of case); *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953) (finding that "[t]he word quorum as therein used [in subsection 46(d)] means such a number of the members of the court as may legally transact judicial business"). Local Rule § 0.14 implemented by the Second Circuit Court of Appeals, moreover, provides that two-judge panels may act in the absence of an originally designated third judge. *See* 2d Cir. R. § 0.14(b) (remaining two judges may act if they are in agreement and neither requests designation of third judge); *Murray v. National Broadcasting Co., Inc.*, 35 F.3d 45, 47-48 (2d Cir. 1994) (holding that two-judge panel may act where recusal occurs just prior to oral argument).

A quorum existed at each stage in which the court below conducted judicial business. The matter was assigned to a panel of three judges consisting of Hon. Guido Calabresi, Hon. Jon O. Newman, and Hon. Frank X. Altimari. At oral argument there was a two-judge quorum consisting of Judges Calabresi and Newman; the Summary Order was issued by a two-judge quorum consisting of Judges Newman and Altimari; and, finally, the court's decision on the petition for rehearing was decided by a unanimous three-judge panel consisting of Judges Newman and Altimari and Chief Judge Ralph K. Winter.

Petitioners' contention that no quorum existed at oral argument because Judge Calabresi recused himself afterwards

warrants little consideration, as it is based on the misguided notion that the subsequent recusal should work, retroactively, to invalidate the quorum that existed at the time oral argument was held. Other than a citation to the definition of "quorum" contained in *Black's Law Dictionary*, petitioners offer no authority for this proposition.

2. Petitioners' contention that the Summary Order rendered by the two-judge panel, after Judge Calabresi's recusal, is invalid because he participated in questioning during oral argument, prior to his recusal, is likewise without basis in law. The circumstance that persuaded Judge Calabresi to recuse himself — that one of the parties is the father of his wife's close friend — was not discovered by Judge Calabresi until *after* oral argument. App. 28a. Due to the nature of the disqualification, which involved no interest — pecuniary or otherwise — in the outcome of the litigation, and its late discovery, Judge Calabresi's participation in oral argument could not have influenced the outcome of the case.

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986), the only authority cited by petitioners, is inapposite. In *Lavoie*, one of the justices of the Alabama Supreme Court personally had another lawsuit pending involving the same legal issues. 475 U.S. 813, 825 (1986). The interested justice not only cast the deciding vote, but authored the court's opinion as well, which had the clear and immediate effect of enhancing the legal status and settlement value of his own case. *Id.* at 822-25. Upon reviewing those facts, this Court held that the interested justice's participation in the case violated the petitioner's due process rights. *Id.* Unlike the interested justice in *Lavoie*, Judge Calabresi was not aware of any grounds for his disqualification — which, in any event, were not pecuniary in nature — until after oral argument.

3. The quorum provisions contained in 28 U.S.C. § 46(d), and in Second Circuit Local Rule § 0.14(a), are not violated when one of the two judges rendering the decision heard a tape recording of the oral argument in lieu of personal attendance. First, there is no constitutional right to present oral argument. *See, e.g., FCC v. WJR, the Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949); *United States v. Marines*, 535 F.2d 552, 556 (10th Cir. 1976). Second, Rule 34 of the Federal Rules of Appellate Procedure permits the appellate court, in its discretion, to decline to hear oral argument of an appeal. Fed. R. App. P. 34.[1] Accordingly, it follows that oral argument need not be attended by the entire appellate panel as a precursor to the judicial determination of a case. *See, e.g., Tobin*, 206 F.2d at 507. In *Tobin*, the Fifth Circuit denied a petition for rehearing in a case where the opinion of the court was written by a judge who was absent during oral argument, holding that, as long as a quorum, pursuant to 28 U.S.C. § 46(d), was attained at the hearing, it was not necessary that the judge writing the opinion was one of the two judges who were present. *Id.*; *see also Aeron Marine Shipping Co., et al v. United States*, 26 Cl. Ct. 946 (1992) (referring to 28 U.S.C. § 46 by analogy in determination that 49 C.F.R. § 1.67 does not mandate that all three members of the Maritime Subsidy Board hear the evidence so long as two members of the board concur).

Petitioners were not denied oral argument. Judges Calabresi and Newman were present during oral argument, constituting a quorum, and Judge Altimari, who was absent during the argument, listened to petitioners' advocacy on audiotape. App. 27a-28a. Petitioners' argument, distilled to its essence, is that Judge Altimari was not able to ask questions of their counsel of record. A judge's presence at oral argument, however, does not

1. Thus, should this Court grant certiorari, the Second Circuit, on remand, could decline to hear oral argument under Rule 34 of the Federal Rules of Appellate Procedure and its Local Rule 34.

guarantee that he or she will question counsel. As the court below noted, "[t]he judge's absence, at most, deprives the lawyers of the 'opportunity' to have the judge ask them questions, surely not a protected right." App. 32a. Certainly, this is not an issue which warrants further consideration by this Court.

4. The Second Circuit's Local Rule § 0.14 does not conflict with 28 U.S.C. § 46(b). Even assuming, *arguendo*, that the two provisions *did* conflict, any such conflict would be immaterial in this instance. There is thus no cause for this Court's review.

Petitioners' premise that 28 U.S.C. § 46(b) mandates a panel of three judges absent death, disability or an emergency certified by the chief judge of the circuit court is faulty.[2] That statute provides in pertinent part:

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2. Petitioners' reliance on *Murray v. National Broadcasting Co.*, *supra*, is misplaced. In *Murray*, the petitioner objected to the court's determination because one of the three judges initially assigned to hear the appeal recused himself before oral argument. As a result, the determination of the appeal was made by the two remaining judges. The court denied petitioner's request for rehearing on the grounds that "the legislative history [of 28 U.S.C. § 46(b)] makes clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member . . . becomes unable to participate." *Id.* at 47. The court in *Murray* clarified the intention of the statute by stating that the statute requires that "in the first instance, all cases would be assigned to a panel of at least three judges" but after that "first instance" there is no requirement that three judges actually hear and/or determine the outcome of the case. The court noted that local rules, such as Rule § 0.14, are "obviously intended to permit the Court to conduct its business expeditiously despite the unanticipated unavailability of one member of a three-judge panel." *Id* .

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, *unless* such judges cannot sit because recused or disqualified, or *unless* the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. . . . (emphasis added)

28 U.S.C. § 46(b). Nothing in this provision limits the instances in which a panel of two judges may hear an appeal. The "unless" clause which precedes the recusal, disqualification and emergency exceptions permits an exception to the requirement that a majority of the three-judge panel must be "judges of that court" — it does not mandate a three-judge panel. *See* S. Rep. 275, 97th Cong., 1st Sess. 19 (1981); 125 Cong. Rec. S12, 143 (daily ed. Sept. 7, 1979); Charles Clark, Chief Judge's Order Declaring an Emergency Under 28 U.S.C. § 46(b) (1991), 28 U.S.C.A. § 46, Historical and Statutory Notes (West 1993) (applying exception due to backlog of cases in the Fifth Circuit); *see also In re Bongiorno*, 694 F.2d 917, 918 n.1 (2d Cir. 1982) (examining the legislative history of 28 U.S.C. § 46(b) and finding that Congress' purpose in enacting the rule was to prevent the instability and unpredictability in the law of a circuit that could result if many panels were composed principally of judges from "outside" the circuit). An interpretation of 28 U.S.C. § 46(b) which would mandate three-judge panels would be at odds with 28 U.S.C. § 46(d), which authorizes two judges to function as a quorum.

Local Rule § 0.14, which permits a judge to be relieved from a panel upon his or her request (among other reasons), is not inconsistent with 28 U.S.C. § 46(b). In any event, any alleged inconsistency is not at issue in this case. Recusal of a

judge is expressly stated as an exception to the composition of a panel under 28 U.S.C. § 46(b). Judge Calabresi's late-discovered disqualification is, by petitioner's own concession, a recognized exception under 28 U.S.C. § 46(b). Thus, a two-judge panel would be permitted even under petitioner's analysis. Petitioners mischaracterize the record, moreover, when they argue that Judge Altimari "withdrew" from the panel before oral argument. Judge Altimari was merely absent from the oral argument; he never requested to be relieved from the panel, nor was he.

Based upon the aforementioned analysis, this Court need not review the decision below because the Second Circuit properly issued the Summary Order in accordance with 28 U.S.C. § 46. That statute clearly does not require that the hearing and determination be made by all three judges of an appellate panel. A determination is valid as long as, pursuant to 28 U.S.C. § 46(d), the decision is made by a majority of the judges constituting a quorum. Here, a majority of the judges — two — issued the Summary Order. A quorum was had, and the Summary Order was properly issued. No review by this Court is warranted.

II.

THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS NOT WARRANTED.

1. Although Rule 10(a) provides that the exercise of the Court's supervisory power is a proper ground for review on a writ of certiorari, this ground is used sparingly, and is most often used where there exists an important or difficult issue of federal practice and procedure. *See, e.g., Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) (reviewing the use of abstention doctrines); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (reviewing the jurisdictional

amount in class actions); *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976) (reviewing the power of a district court to deny removal from a state court because the district court's docket was too heavy); *Bruner v. United States*, 343 U.S. 112 (1952) (examining the jurisdiction of federal district courts); *Sacher v. United States*, 343 U.S. 1 (1952) (reviewing the scope of federal contempt powers); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946) (reviewing the proper establishment of federal jury panels); *McNabb v. United States*, 318 U.S. 322, 341 (1943) (exercising supervisory authority over the administration of criminal justice in federal courts to review rules of evidence as applied in federal criminal prosecution).

The issue in the case at hand, which is based upon the confluence of peculiar events, simply does not merit attention by this Court. There is no conflict among the circuits. Despite petitioners' dire predictions, nothing in the decision of the court below permits the regular assignment of cases to a panel of two judges or authorizes oral argument to be had before a tape recorder in lieu of a quorum of judges. Simply put, it was coincidental that, in the same case, Judge Altimari could not attend oral argument and Judge Calabresi had to recuse himself as a result of a late-discovered disqualification. This was not a deliberate arrangement, nor can it be characterized as a "newly created procedure." Accordingly, this Court should deny the petition.

2. This Court, moreover, should not waste its limited judicial resources in granting a writ of certiorari in this matter. Petitioners' only remedy, should this Court reverse the court below, would be a remand for a new oral argument. As discussed *supra*, oral argument is not required. The Second Circuit panel to which this action would be remanded — which could be the very same three-judge panel which denied the petition for a rehearing, two of whom issued the Summary Order — could

determine that oral argument is unnecessary under Rule 34 of the Federal Rules of Appellate Procedure and Second Circuit Local Rule 34. Furthermore, inasmuch as the Second Circuit designated its original decision (App. 1a-10a) as a "Summary Order," which may not be cited as precedential authority to the Second Circuit or any other court, only petitioners are affected by the original decision of the court below, and that court's denial of their petition for a rehearing. The decisions below, which were fact-based, will not have any broad or national impact and do not justify review by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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